85-1308

NO.

IN THE

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1986

FRANK GERACE and FRANK MATERIO,
Petitioners,

v.

STATE OF NEW JERSEY CASINO CONTROL COMMISSION
and
STATE OF NEW JERSEY, DEPARTMENT OF
LAW AND PUBLIC SAFETY, DIVISION OF
GAMING ENFORCEMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

RONALD F. KIDD (Counsel of Record)
STEVEN M. JANOVE
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
(215) 854-6300

HARRY A. HORWITZ
DAVIS, REBERKENNY & ABRAMOWITZ
499 Cooper Landing Road
Cherry Hill, NJ 08002
(609) 667-6000
Attorneys for Petitioners

January 30, 1986

QUESTIONS PRESENTED

1. Whether the New Jersey Casino Control Commission violated two union officials' First Amendment right to freedom of association when the agency expressly found that the officials committed no improprieties and no illegal acts, but nevertheless ordered them to resign because the agency feared that their association with a reputed member of organized crime might result in future acts of misconduct.

2. Whether section 86(f) of the Casino Control Act is unconstitutionally vague on its face and as applied because an individual of ordinary intelligence does not have adequate notice of who is a "career offender" and what conduct is prohibited by the Act.

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NO. 86

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK GERACE and FRANK MATERIO,
Petitioners,

v.

STATE OF NEW JERSEY CASINO CONTROL COMMISSION
and
STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Petitioners Frank Gerace and Frank Materio respectfully request that a Writ of Certiorari be issued to review the judgment of the New Jersey Supreme Court, entered on November 1, 1985, which

denied Certification from the decision of the New Jersey Superior Court, Appellate Division. The New Jersey Superior Court, Appellate Division upheld the decision and judgment of the State of New Jersey Casino Control Commission.

OPINIONS BELOW

The judgment order of the New Jersey Supreme Court, not yet reported, appears in the Appendix. (1a). The unreported opinion of the New Jersey Superior Court, Appellate Division, appears in the Appendix. (3a). The unreported opinion of the New Jersey Casino Control Commission appears in the Appendix. (112a).

The opinions of the United States Supreme Court United States Court of Appeals for the Third Circuit and District Court for the District of New Jersey in earlier related proceedings in this case are reported under the caption Hotel & Restaurant Employees & Bartenders International Union Local 54 v. Danziger, 536 F. Supp. 317 (D.N.J. 1982, rev'd, 709

F.2d 815 (3d Cir. 1983), vacated, 104 S. Ct. 3179 (1984).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on November 1, 1985. This petition for certiorari was filed within ninety days of that date. This Court has jurisdiction to review the judgment of the New Jersey Supreme Court by writ of certiorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

> Congress shall make no law...abridging the freedom of speech...

AMENDMENT XIV. Section 1

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;...

STATUTORY PROVISION INVOLVED

Section 86(f) of the New Jersey Casino Control Act; N.J.S.A. 5:12-86(f) Casino License - disqualification criteria:

The Commission shall deny a casino license to any applicant who is disqualified on the basis of any of the following criteria:

> f. The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders:

STATEMENT OF THE CASE

Petitioner Frank Gerace is the ex-President of the Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"). Petitioner Frank Materio is a business manager at Local 54. This civil matter involves Petitioners' disqualification by the Casino Control Commission (the "Commission") pursuant to section 86 of the Casino Control Act (the "Act"). Section 86 sets out the criteria under which an applicant will be denied a license. Petitioners Gerace and Materio

were disqualified under section 86(f) of the Act as a result of what the Commission found was their "association" with Nicodemo Scarfo, an individual the agency determined to be a "career criminal offender." According to the Commission, this association was "inimical to the policies of the Act."

1. THE COMMISSION PROCEEDINGS

After an investigation conducted by its enforcement arm, the Division of Gaming Enforcement (the "Division"), the Commission held public hearings on Petitioners' qualifications from June to September, 1982. The Commission issued its final disqualification decision on September 28, 1982.

a. The Majority Opinion

The majority disqualified Gerace based on five general areas of evidence:

First, Scarfo kept Gerace's name on his telephone list in code. The Commission, however, stated that this fact demonstrated nothing more than Scarfo's interest in the union and his desire to keep it secret. (135a).

Second, the Commission noted that Gerace put

up $10,000 in bail for Scarfo. (140a). In fact, in a transaction that was completely open and legitimate, Gerace loaned his mother $10,000. (32a, 140a). Mrs. Gerace gave this money -- in addition $10,000 of her own funds -- to her best friend, Mrs. Scarfo, so that her son could obtain bail. Gerace admitted that he knew what his mother intended to do with the money. Nevertheless, Gerace acted as he did because he was beholden to his mother.

Third, the Commission relied on the immunized testimony of Joseph Salerno, a self-confessed "gangster" (146a) and accomplice to a murder (146a). Indeed, Salerno admitted that he associated with persons whom he believed were gangsters so that he could share in the "glamour" and "glory" and economic benefits. Salerno was the only witness who linked Scarfo to Local 54. Salerno testified before a United States Senate Subcommittee that Scarfo controlled the day to day affairs at Local 54 and that he overheard Scarfo and Gerace discussing union business. (34a). On cross-examination before the Commission, how-

ever, Salerno admitted that he never overheard any conversation between Gerace and Scarfo and never heard them say anything to each other about Local 54, "and had merely assumed that they discussed union business." (149a)(emphasis added). Salerno also admitted that Scarfo lied to him about all matters of significance. (150a). Therefore, Petitioners argued that Salerno's testimony added nothing to the finding of organized crime influence on Gerace.

Fourth, although the Commission found that Gerace appointed to union positions persons known to Scarfo, the agency conceded that: "the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise improperly in the conduct of the Local's affairs...." (199a). More importantly, the New Jersey State Police Officer in charge on the Division's investigation of Local 54 admitted in his deposition testimony that there was no evidence that these appointments were the result of Scarfo's influence.

Fifth, the Commission cited four disputed

business dealings between Local 54 and alleged Scarfo associates. The union, however, only played a role in two of these contracts, about which the Commission found "no evidence... of any irregularities" in the way they were obtained or performed for Local 54. (170a). Indeed, the Commission conceded that each of the disputed business dealings were entirely legitimate and devoid of any irregularity. (170-175a).

The Commission conceded that the evidence against Materio was even more circumstantial than the evidence against Gerace. Indeed, the Commission stated that in "Materio's case, we do not have the evidence of direct, frequent contact with Scarfo...." (203a). Moreover, in a deposition answer that was given great emphasis by Petitioners before the Appellate Division, the head of the Division's unit investigating Local 54 revealed that he was unaware of any facts, communications or transactions which indicated that Scarfo, through his alleged association with Materio, had exercised influence on the affairs of Local 54.

As to Materio, the Commission relied on the

following three pieces of evidence:

First, Scarfo kept Materio's name on his telephone list. Like Gerace, the Commission recognized that this fact demonstrated nothing more than Scarfo's interest in the union. (135a).

Second, Materio helped Scarfo make bail. Like Gerace, Materio contended that he did this as a favor to Katherine Scarfo, whom he knew for approximately twenty years. (142a). Although perhaps ill-advised, Materio's conduct did not establish influence by Scarfo.

Third, the Commission credited the testimony of Joseph Salerno concerning a conversation between a union official and a Scarfo associate that involved a scheme to defraud the union. (154a). The Commission accepted Salerno's testimony that Materio overheard this conversation -- but said nothing. (154a). Materio, however passed a polygraph examination that tested his assertion that he was not present during the alleged conversation and never overheard it. (36a). In addition, even if Salerno's testimony was true, the Commission conceded that the scheme was never

acted upon and never even involved Materio. (154a). Therefore, Petitioners argued that this evidence was irrelevant.

Despite the ambiguity of the evidence, the Commission found that Petitioners were "influenced" by Scarfo, whom the agency concluded was a "career offender." The Commission, however, conceded that there was no direct evidence of influence and, indeed, not even any evidence of improprieties in the way Petitioners conducted union business. (199a). Moreover, the agency stated that the evidence was "uncontradicted" that "Gerace and Local 54 were effective and honest employee representatives." (189a). Despite the fact that there was no evidence of any improprieties, the Commission disqualified Petitioners because it stated that the "number" of alleged Scarfo associates with "ties" to the union could not be a mere "coincidence." (200a). Therefore, the Commission disqualified Petitioners because it sought to prevent future wrongdoing that it predicted might occur.

b. The Dissenting Opinion

Commissioner Joel R. Jacobson vigorously dissented from the majority's conclusion that the record established actual influence. Commissioner Jacobson wrote:

> "... there has been no reliable or substantial evidence before this Commission of any influence, any impropriety, or any crime." (247a) (emphasis added).

Commissioner Jacobson charged the majority with discarding the presumption of innocence and disqualifying Petitioners based on "guilt-by-association." (249a). The Commissioner also asserted that the majority disqualified Appellants to prevent future influence and characterized the majority's opinion as an "abandonment of American democratic traditions." (248a). Commissioner Jacobson stated:

> "The conclusion one must reach is that the majority believes that while the Scarfo influence on Local 54 cannot be proved by hard evidence today, there is always the possibility that his association with Gerace and Materio could be "inimical" at some point in the future. If this is the logic of the disqualification order, it is based upon an abandonment of American democratic traditions. (248a). (emphasis added).

Commissioner Jacobson asked:

> Are we to condemn an innocent individual today, because at some distant future time, he may commit an impropriety?" (249a). (emphasis added).

c. The Commission's Order Sanctioning Local 54

As noted, the Commission issued an opinion, dated September 28, 1982, in which it found that Petitioners were disqualified under section 86(f) of the Act. The Commission also issued an order which: 1) required Petitioners removed from their union positions by October 12, 1982; and 2) stated that, pursuant to section 93 of the Act, if Petitioners were not removed by that date, Local 54 would be prohibited from collecting dues from workers in the casino industry. N.J.S.A. 5:12-93.

2. RELATED FEDERAL COURT PROCEEDINGS AND THE COMMISSION'S SUPPLEMENTAL ORDER SANCTIONING PETITIONERS

Prior to the Commission's evidentiary hearing and disqualification decision, Local 54 sought a preliminary injunction in the United States District Court of the District of New Jersey. This Motion was denied on March 22, 1982. Local 54 appealed the District Court's Order to the United

States Court of Appeals for the Third Circuit.[1] On June 6, 1983, the Third Circuit Court of Appeals issued a 2-1 decision holding that the disqualification standards for union representatives and the dues collection ban established by N.J.S.A. 5:12-93 were both preempted by Section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973). See Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danzinger, 709 F.2d 815 (3d Cir. 1983).

The State of New Jersey appealed the ruling of the Third Circuit to the United States Supreme Court. On July 2, 1984, the United States Supreme Court vacated the judgment of the Court of Appeals and held that Section 93 of the Act is not preempted by Federal labor laws to the extent that

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1. After the Commission issued its decision in September 1982 -- and while the appeal from the district court's denial of the preliminary injunction was pending in the Third Circuit -- the district court on October 1, 1982 issued an order enjoining the Commission from enforcing the Section 93 sanctions against Local 54 pending the outcome of the federal court appeal.

it imposes certain limitations on casino industry employees' choice of whom may serve as their collective bargaining representative. Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54, 104 S. Ct. 3179 (1984). In dicta, this Court stated that the "Act... apparently grants broad powers to the Commission to impose sanctions directly on disqualified persons.... 104 S. Ct. at 3191. (emphasis added).

Following this Court's suggestion, on September 12, 1984, the Commission withdrew its decision to impose the dues collection sanction. In its place, the Commission issued an order directing sanctions at Petitioners as individuals -- as opposed to its previous order sanctioning the union -- if Petitioners were not removed from their union positions. Petitioners subsequently submitted their resignations to the union's executive board.

3. PROCEEDINGS IN THE NEW JERSEY SUPERIOR COURT, APPEALLATE DIVISION

On July 11, 1985, an Appellate Division panel of three judges unanimously affirmed the Commission's decision. First, the Appellate Division

considered Petitioners' contention that there was insufficient credible evidence to support the Commission's finding of Scarfo's alleged "influence" upon their union activity. Petitioners argued that if Scarfo was indeed a "career criminal offender", than any "influence" he exerted on Petitioners would have inherently resulted in -- at the very least -- some form of questionable conduct. Because the Division's investigation -- spanning almost three years and costing hundreds of thousands of dollars -- found no evidence of any impropriety, Petitioners argued that the only reasonable inference was that there was no Scarfo influence at work upon them. In short, Petitioners asked the Appellate Division to adopt Commissioner Jacobson's finding that "... there [was] no reliable or substantial evidence before [the] Commission of <u>any influence</u>, <u>any impropriety</u>, <u>or any crime</u>." (247a). (emphasis added).

Like the Commission, however, the Appellate Division found that the "sheer number of ties to Scarfo renders incredible an innocent explanation." (38a). Therefore, like the Commission, the

Appellate Division considered the quantity of the evidence without examining the quality of the evidence in determining that the Commission's findings of fact were supported by sufficient credible evidence.

Second, the Appellate Division considered Petitioners' contention that the Commission violated their First Amendment freedom of association. Petitioners argued that the agency violated their constitutional rights by ordering them to resign from their union positions due to an association with a reputed member of organized crime that the agency conceded did not result in any improprieties or illegal conduct. Petitioners claimed that they were penalized because the State agency found the disputed association distasteful and feared it would result in some future improper conduct.

The Appellate Division reviewed the relevant case law, including Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984), concluding that "courts have expanded the right to [freedom of association to] include associations with no overtly political purpose." (41a). The Court stated, however, that "[a]lthough Roberts

has expanded the right of association to encompass both 'expressional associations,' and certain 'intimate human relationships', that case has not raised to the level of First Amendment protection every social relationship which may exist in a society." (50a)(quoting Roberts, 104 S. Ct. at). In light of Petitioners' claim that their association with Mr. Scarfo was purely social, the Appellate Division assumed "arguendo" that Petitioners relationship with Scarfo was protected by the First Amendment. (50a).

The Appellate Division therefore considered whether -- because the "First Amendment right of association is not absolute" (51a) -- the State of New Jersey's infringement on Petitioners' right of association was justified by a compelling State interest. Petitioners conceded that the State has a compelling interest in "keeping organized crime out of unions representing casino employees." (51a). Petitioners, however, claimed that the State interest was not sufficient to infringe upon their freedom of association unless there was evidence of some impropriety -- not the fear of future

acts of misconduct. (52a).

Rejecting Petitioners' argument, the Appellate Division held that the Commission demonstrated a compelling interest "in protecting the casino industry... justif[ying] any associational infringement resulting from the disqualification of Gerace and Materio." (55a). According to the Appellate Division, "the operative question is not whether the associations between Gerace, Materio and Scarfo are lawful or ethical, but rather what impact such associations have on the policies intended to be served by casino gaming regulation." (55a).

Third, the Appellate Division considered the claim that section 86(f) was unconstitutionally vague on its fact and as applied to Petitioners. Petitioners argued that the statute failed to provide any notice as to who was a "career offender" or as to the meaning of an "inimical" association. Petitioners asked -- as applied to them -- when did Nicodemo Scarfo become a career offender? Considering that until 1983 Scarfo was permitted to gamble and receive "complimentary" privileges at

the casinos, Petitioners also asked, how were they to have known in 1982 -- when they were disqualified -- that their association with him was prohibited by the Act?

In response to the vagueness challenge, the Court held that section 86(f) was constitutional on its face because "[c]ourts have repeatedly upheld, as against vagueness challenges, criterion less definite than that challenged here." (63a). The Court specifically relied on In re Boardwalk Regency Casino Application, 180 N.J. Super. 324, 345-47 (1981) modified 90 N.J. 361 (1982). According to the Appellate Division, the "disqualification standard of N.J.S.A. 5:12-86(f) as interpreted and refined by the Commission, is at least as definite and validly applicable to certain types of conduct as was the

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2. The Appellate Division noted that Petitioners' vagueness challenge to the term "inimical" was rejected by the United States District Court in Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danziger, 536 F. Supp. 317 (1982).

"good character" standard approved of in Boardwalk Regency." ( ).

The Appellate Division further held that the application of the section 86(f) term "inimical... association" to Petitioners was not unconstitutional. The Appellate Division stated that Petitioners should have known from the "press" that "Scarfo was not a highly reputable citizen." (67a). Moreover, the Court stated that the fact that Scarfo had been charged with homicide -- a crime of which he was acquitted -- "should have warned [Petitioners] of Scarfo's possible exclusion from the gaming industry." (67a).

4. PROCEEDINGS IN THE NEW JERSEY SUPREME COURT

On August 23, 1985, Petitioners filed in the New Jersey Supreme Court a timely Notice of Appeal from the decision of the New Jersey Superior Court, Appellate Division. The Notice of Appeal stated that "[t]his appeal is being prosecuted pursuant to R. 2:2-1(a)(1) with respect to the Casino Control Commission's decision to disqualify Mr. Geraace and Mr. Materio under the Casino Control Act

due to a 'social association' in violation of the First Amendment of the Federal Constitution."

On July 31, 1985, Petitioners filed in the New Jersey Supreme Court a timely Petition for Certification, which asked the Court to exercise its discretionary power of review pursuant to R. 2:12-4 to determine, inter alia, whether section 86(f) was "unconstitutionally vague on its face and as applied."

On November 1, 1985, the New Jersey Supreme Court filed an order denying the Petition for Certification (1a). Pursuant to R. 2:12-9, The Court's order dismissed the appeal filed on the First Amendment issue.

REASONS FOR GRANTING THE WRIT

The clear cut legal questions presented by this precedent setting litigation are precisely the type of controlling issues that warrant review by this Court. The statute involved in this matter directly affects the power of a State to force freely elected union leaders to involuntarily resign -- not because they commit crimes; not because they commit improprieties; and not because they

perform poorly. Rather, section 86(f) of the Act empowers the State of New Jersey to dismiss freely elected union leaders solely because they associate with individuals the State deems disreputable. Therefore, unless this Court reviews the decision of the Commission and New Jersey Courts, the State of New Jersey will have the precedent of this case to deny individuals their union positions and a union its chosen leaders simply because it determines there is a "risk" of future harm to the public in their disputed associations. (Point I).

In particular, the instant matter offers this Court an opportunity to clarify the scope of an individual's right to freedom of association that was set out most recently in Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984). In Roberts, this Court confirmed that the concept of the First Amendment freedom of association has been expanded to include associations that do not necessarily involve the advancement of beliefs and ideas. Petitioners contend that their disputed association is protected under the right this Court labelled "free-

dom of intimate association." Roberts, 104 S. Ct. at 3249-3250. (Point IA).

In addition, the decision of the New Jersey courts demands review by this Court so that a more precise standard of state interest can be articulated. In Roberts, this Court unambiguously stated that the freedom of association is not absolute, but rather may be infringed if necessary to serve "compelling state interests." Roberts, 104 S. Ct. at 3252. Petitioners contend that this Court must reverse the decision of the New Jersey courts that their State could sufficiently justify the infringement of Petitioners' freedom of association based on the need to prevent future acts of misconduct. This State interest -- which is of course legitimate -- is not "compelling" when the individuals whose rights are infringed -- have by the State's own admission -- never committed any prior act of misconduct. (Point IB).

Finally, the decision of the New Jersey courts that the term "inimical... association" is not unconstitutionally vague conflicts with its own

prior decisions. Petitioners contend that this statutory language failed to give fair warning as to what associations are not permitted under the Act. According to the New Jersey Courts, however, this language is not only constitutionally precise, but because Petitioners "should have known" from "press reports" that their association with Scarfo was impermissible under the Act, the statute is constitutional as applied to them. If permitted to stand, this construction of due process will allow a State to substitute phantom notice from unconfirmed assertions in the press with constructive notice from clear and understandable statutory language that reasonably apprises a person of what conduct is improper. (Point II).

In view of the general importance of the issues to union officials throughout the country, and in view of the need for further guidance from this Court as to the scope of the freedom of association that was expanded in Roberts, review of this case at this time is fully warranted.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE STATE OF NEW JERSEY VIOLATED TWO UNION LEADERS' FIRST AMENDMENT RIGHT OF ASSOCIATION WHEN IT FORCED THEM TO RESIGN BECAUSE OF THE STATE'S FEAR THAT THEIR ASSOCIATION WITH A "CAREER CRIMINAL" MIGHT RESULT IN FUTURE ACTS OF MISCONDUCT

The Commission disqualified Petitioners due to their social association with an individual whom the State found was a "career criminal." According to the State, this individual exercised a corrupting influence on Petitioners that might have led to some form of future improper conduct. The First Amendment, however, protects social associations -- even if they do not involve the advancement of political ideas -- as long as the relationship involves no illegality or misconduct. Petitioners contend that their disputed relationship is therefore protected because the Commission conceded that it involved no illegality or even any misconduct. (199a). Petitioners' disqualification must be vacated because: 1) the Commission infringed on their constitutionally protected freedom of association. (Point IA); and 2) the infringement cannot be justified by a sufficiently compelling State interest (Point IB).

A. Petitioners' Disputed Association Is Protected By The Expanded Right To Freedom Of Association

The Constitution protects the freedom to associate as a right peripheral to and supportive of the exercise of other rights guaranteed by the First Amendment. Griswold v. Connecticut, 381 U.S. 479, 483 (1965); NAACP v. Alabama, 357 U.S. 449, 462 (1958). Many of the cases that have discussed the freedom of association have arisen in the context of speech or political activity that is the core of the First Amendment. NAACP v. Alabama is such a case.[3] The bounds of the freedom of association, however, have gradually been expanded to include purely social and personal associations.

This Court recently confirmed the expansion of the limits of the freedom of association in Rob-

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3. In NAACP v. Alabama, the United States Supreme Court struck down a state-imposed requirement that the names of members of a politically unpopular group be made public. This Court stated that the law unacceptably retarded the group's advocacy of political and legal change. 357 U.S. at 462-63.

erts v. United States Jaycees, 104 S. Ct. 3244 (1984). Roberts expressly recognized that the Constitution protects freedom of association "in two distinct senses." Id. at 3249.

In the first sense, NAACP v. Alabama and its progeny recognize a "right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." Id. at 3249. This Court stated that these decisions protect what it labeled the "freedom of expressive association."

In the second sense, the more recent line of decisions recognize that "certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Id. This Court stated that these decisions protect what it labeled the "freedom of intimate association."

The notion set out in the Jaycees case that the Constitution protects "intimate associations" is

reinforced by Eleventh Circuit's 1984 decision in Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984). The Wilson case further confirmed the expansion of the freedom of association to include protection for social relationships. In Wilson, the Court ruled that "dating is a type of association which must be protected by the first amendment's freedom of association." Id. at 1544. The Court stated:

> "Where two individuals seek to associate with each other, without any evidence of promulgating and advancing political or religious beliefs, they are protected under the freedom of association provision."

Id. The Court held that a state violates the First and Fourteenth Amendments when it seeks "to interfere with the social relationship of two or more people." Id. Applying this principle, the Court held that a police officer could not be fired because of his social association with the daughter of a reputed member of organized crime, even though the association involved contacts with the father. Id. Inasmuch as Wilson stands for the proposition that the Constitution protects a social association with a mobster's daughter, the Commission's dis-

qualification creates the anomolous result that Petitioners can maintain an association with Scarfo's children -- and through that association have contact with Scarfo -- but they cannot have a direct association with Scarfo himself.

Similarly, the Fifth Circuit adopted an expansive view of the freedom of association in Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). The Sawyer Court concluded that an overly broad anti-loitering statute violated an individual's right of association. In Sawyer, the defendant's "only 'criminal' act was to associate with certain individuals, knowing that they were unlawfully using or possessing illegal drugs." Id. at 316. The Court found that by convicting the defendant for innocent associational activity, the ordinance infringed on his freedom of association. Therefore, Sawyer stands for the proposition that an individual's right to associate encompasses the right simply to meet with other people -- no matter whether the meeting is intended to advance shared beliefs.

Likewise, the Court in McKenna v. Peekskill

Hous. Auth., 497 F. Supp. 1217 (S.D.N.Y. 1980), modified, 647 F.2d 332 (2d Cir. 1981) held that the First Amendment protects associations that are not limited to situations where an advancing of common beliefs occurs. Notably, the court stated that [m]ore recent cases have properly recognized that that the First Amendment also applies to social and personal associations, including those which do not purport to express and advocate ideas." Id. at 1221. In addition, the court stated:

> "This Court agrees that the First Amendment's protection for freedom of association extends to private and social associations, even when the aggregation of persons has no hortatory purpose.... Simply because a group, or even a pair, of persons has not distilled the fruits of their relationship into a body of thought or into a political programme, government interference with their interaction nonetheless implicates the First Amendment."

Id. (emphasis added).

Three cases decided before 1980 also recognized that the First Amendment applies to social and personal associations -- including those that do not involve the advancement of beliefs and ideas. First, in Tyson v. New York City Hous. Auth., 369

F. Supp. 513 (S.D.N.Y. 1974), the Court held that public housing tenants had a cause of action under their constitutionally protected associational rights when they were threatened with eviction because of acts committed by their adult children. The Court stated:

> "The nub of this claim is that by declaring these tenants ineligible for continued occupancy on the basis of their children's acts, the defendants have acted 'solely from the fact of association' by the plaintiffs with their children.... Such a claim, if proven, would run afoul of the First Amendment which guarantees to every person the right to freely associate with others, including members of his family."

Id. at 520 (quoting Fisher v. Snyder, 346 F. Supp. 396, 398 (D.Neb. 1972)) (emphasis added).

Second, in Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970), the Court enjoined a police department from refusing to employ an otherwise qualified individual solely because he belonged to an organization of nudists. The Court stated that it "is too late in the day to doubt that this freedom of association extends only to political or conventional associations and not to the social or the unorthodox." Id. at 65. Although members

of a nudist society might impliedly intend to advance certain beliefs about their values, the Bruns Court found no evidence that such an intent existed. Therefore, the Court decided the case based on the police department's infringement of the disputed individual's mere social and personal association with others. Id. at 66-67.

Third, in Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), aff'd, 476 F.2d 375 (8th Cir. 1973), a public school teacher was terminated because she had male friends of the family as overnight guests, which the School Board characterized as "conduct unbecoming a teacher." In ordering her reinstatement, the Court found that the teacher's right to freedom of association was violated because she was terminated based on "the mere fact of association itself." Id. at 399. Significantly, the Court did not find that First Amendment rights could be distinguished between personal associations and associations involving membership in organizations advancing ideas and beliefs. Id.

Finally, Scales v. United States, 367 U.S. 203 (1961) and its progeny are also relevant in deciding

the limits of the freedom of association. In Scales, the Court determined the constitutionally of the Smith Act, 18 U.S.C. §2385 (1970), which prohibited knowing membership in any organization advocating the overthrow of the government by force. Although the statute punished only knowing membership, the Supreme Court found that mere knowledge of the criminal nature of an organization was an insufficient basis for a conviction. The Court ruled that the statute was constitutional to the extent that it reached "active" members who had both a guilty "knowledge and intent." 367 U.S. at 228. (emphasis added). According to the Court, such a limitation "prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any committment to undertake such action." Id.

Unlike the previously noted cases, Scales concerned an association involving the advancement of political ideas. Nevertheless, Scales is significant because it stands for the proposition that a knowing association with a group cannot be made

a punishable act merely because some of the group members are engaged in criminal conduct. In the instant case, section 86(f) has been construed by the Commission to punish Petitioners not for their own misconduct, but rather for the act of formerly associating with an individual allegedly engaged in criminal activity. Under the principles of Scales and its progeny, however, the punishment of an individual must be predicated upon personal guilt.[4]

The New Jersey Superior Court, Appellate Division reviewed the above canvass of precedent in

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4. Cf. United States v. Robel, 389 U.S. 258, 262 (1967) (striking down an anti-subversive statute on First Amendment grounds because the Act authorized sanctions due to the mere exercise of the right of association, without any consideration of whether the alleged offender shared the organizations' goals); Elfbrandt v. Russell, 384 U.S. 11, 16-17 (1966) (striking down a loyalty oath statute on First Amendment grounds because it authorized penalties based on mere membership in an organization, even if the alleged offender did not subscribe to its illegal purposes).

this area and agreed that the First Amendment freedom of association has been expanded to protect personal associations which do not necessarily involve the advancement of any beliefs -- as long as there is no improper conduct. (50a). Moreover, the Appellate Division cited Roberts for the relevant standard that must be applied to determine whether a disputed association is within the ambit of the freedom of "intimate" association. According to this Court in Roberts, protected social associations "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." 104 S. Ct. at 3250. This Court noted that factors such as "size, purpose, policies, selectivity [and] congeniality" are relevant to the determination of whether the social association is protected. Id. at 3251.

Measured by the criteria of Roberts, Petitioners' contended that their disputed relationship with Scarfo was protected. Petitioners and Scarfo represented a numerically small, selective and

purely personal association involving no strangers. Moreover, Petitioners and Scarfo constituted no more than a small group of individuals having a social relationship.[5] Not surprisingly, the Appellate Division assumed, "arguendo" that Petitioners' relationship with Scarfo was constitutionally protected. (50a).

The State of New Jersey infringed on Petitioners' constitutionally protected association when it forced them to resign their union positions. The State's action is comparable to the constitutional violation in Sawyer v. Sandstrom, where the defendant was punished for having "the wrong kind of friends." 615 F.2d at 313. Such punishment, however, that results from a wholly non-criminal, purely personal relationship, is a

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5. In Roberts v. Jaycees, this Court held that the Jaycees organization fell outside the category of relationships worthy of constitutional protection under the "freedom of intimate association." Crucial to the Court was the fact that the Jaycees were "neither small nor selective" nor intimate. 104 S. Ct. at 3251. In contrast to the Jaycees, Petitioners' disputed association was numerically small and unlike the Jaycees, involved no strangers.

violation of the "freedom of intimate associations," unless it can be justified by a compelling State interest.

B. The State Failed To Demonstrate A Sufficiently Compelling Governmental Interest

After properly assuming that Petitioners' disputed association was protected within the expanded boundary of the freedom of "intimate" association, the State court held that the Commission demonstrated a sufficiently compelling interest to justify its infringement on Petitioners' rights. According to the Appellate Division, The "State's interest in maintaining the integrity of the casino operations supersedes [Petitioners'] right to freedom of association." (55a). In so holding, the State of New Jersey severely undermined the freedom of association.

Petitioners conceded the interest of the State of New Jersey in keeping organized crime out of unions representing casino employees. (51a). Nevertheless, this legitimate State interest does not justify the Commission's infringement on Pet-

itioners' constitutional rights. The Commission did not disqualify Petitioners because they had committed any form of misconduct. Rather, the state agency forced Petitioners to resign because it feared their future acts of misconduct. Petitioners ask this Court to review whether an incalculable risk of future acts of misconduct -- by union officials who were found not to have committed any past acts of misconduct -- can justify the State's infringement on their First Amendment rights.

By merely labelling Scarfo a "career offender" and finding that he had an association with Petitioners, the Commission and State courts avoided the "strict scrutiny" this Court requires to be found in order to justify the infringement of the freedom of association. Roberts v. United States Jaycees, 104 S. Ct. 3244, 3251 (1984); Elrod v. Burns, 427 U.S. 347, 362-63 (1976). Indeed this Court has stated that a "State cannot foreclose the exercise of constitutional rights by mere labels." NAACP v. Button, 371 U.S. 415, 429 (1963). In the instant case, labels substituted

for reasoned analysis. The best evidence of the lack of solid reasoning and fair evaluation of the evidence is the fact that both the Commission and the State courts ignored the most important finding in the case -- the absence of even a single act of misconduct by either Petitioner at any time during their union careers.

The challenged statute is a draconian impediment to the union movement in that it gives the State an absolute veto power over whom union members can choose as their leaders. Thus, the State courts' ruling upholding section 86(f) directly affects several hundred union officials in New Jersey and many thousands of union members. As Commissioner Jacobson stated in dissent, the Commission's application of section 86(f) to disqualify union leaders for fear that they might sometime in the future commit some misconduct is an "abandonment of American democratic traditions." (248a). Petitioners would add to the Commissioner's opinion that the state courts' affirmance of the Commission's action is also an abandonment of the American tradition that union members have

the right to select collective bargaining representatives of their own choosing.

In NAACP v. Alabama, this Court recognized that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460-61 (emphasis added). In this case, by contrast, the Commission's infringement of Petitioners' associational rights received virtually no scrutiny from the New Jersey courts. For this reason alone certiorari should be granted to review the State courts' disregard and apparent misperception of the crucially important and fundamental First Amendment values at issue in this case.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE STATUTE UPON WHICH THE STATE OF NEW JERSEY PREMISED ITS ACTION IS UNCONSTITUTIONALLY VAGUE IN THAT IT FAILS TO GIVE NOTICE OF WHAT CONDUCT IS PROHIBITED

The New Jersey courts erred in concluding that section 86(f) is not void for vagueness on its face and as applied to Petitioners.

First, the statute is vague as applied because it afforded no notice to Petitioners that

Scarfo was a career offender. Although Petitioners conceded that Scarfo was a career offender in 1982, they had no way of determining when he took on that status. Since Petitioners did not have notice that Scarfo was a career offender until after the Division sought their disqualifications, they did not have an adequate opportunity to disassociate themselves from Scarfo prior to the Commission's attempt to have them removed from their union offices. Petitioners were therefore trapped by the Act's lack of fair warning.

Second, although section 86(f) is clear in its requirement that something more than an association with an organized crime figure is necessary for the disqualification of a union official, the statutory standard of "inimical" is impermissibly vague on its face. The word fails to provide a person of ordinary intelligence with sufficient notice <u>of what conduct</u> is prohibited. It does not establish the precise measure of intolerable conduct and thus fails to give sufficient notice to a reasonable person. In addition,

the use of the term "inimical" constitutes an impermissible legislative delegation of authority to a state agency because it requires the Casino Control Commission to decide disqualifications on an ad hoc and subjective basis.

In response to Petitioners' claims, the Division argued that notice was provided by "official reports of law enforcement agencies, and by general media publicity." Moreover, the Commission expressly stated that Petitioners should have known that Scarfo was a career offender because of his "notoriety as an organized crime 'boss'". Yet the Division itself admitted that Scarfo did not become an organized crime "boss" until March, 1981 -- only one month before the Division sought to disqualify Gerace and Materio. Therefore, under New Jersey's notion of fair warning, Petitioners had four weeks notice -- supposedly obtained from press reports of Scarfo's ascendancy to the status of "boss" -- to terminate their alleged association with Scarfo.

There is no novelty in finding a statute void on its face where it is couched in terms "so vague

that persons of common intelligence must necessarily guess at its meaning and differ as to its application." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)(quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)). See Coates v. Cincinnati, 402 U.S. 611, 614 (1971); State v. Lashinsky, 81 N.J. 1 (1979). The question is ultimately one of fairness. The court must ask: Should the person challenging the statute have understood that his conduct was proscribed; should he have understood that the penalty to be imposed was the sanction intended by the legislature? In Re DeMarco, 83 N.J. 25 (1980). If this Court finds that the statutory provisions are impermissibly vague, then the alleged conduct complained of is exempt from its prohibitions.

In Grayned v. City of Rockford, 408 U.S. 104 (1972), this Court reviewed the principals that are offended by vague laws and set forth a twofold purpose in requiring that legislation be sufficiently specific. The Court first "insist[ed]" that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Id. at

108-109. Secondly, the Court mandated "explicit standards" for those who apply the statutes so as to avoid "arbitrary and discriminatory" enforcement. Id.

In this case, the specific question is whether a union leader of ordinary intelligence is given fair notice by section 86(f). Petitioners were unjustly pursued by an overly oppressive reading of the Casino Control Act. Neither the Division, nor the Commission could ascribe foreknowledge to Petitioners that their mere association with a career offender, absent any improper conduct, would disqualify them as union leaders.

A. Section 86(f) Does Not Give A Union Leader Of Ordinary Intelligence Adequate Notice Of Who Is A "Career Offender"

Section 86(f) of the Act enables the Commission to disqualify any individual who is associated with a "career offender" when the association is of such a nature as to be inimical to the policy of the Act. Although section 86(f) does define

the term career offender[6], procedural due process requires that -- in applying the statute to Petitioners -- they should have been given notice that Scarfo was, in fact, a career offender prior to the Division's quest for their disqualification. The New Jersey Supreme Court has stated that the defendant should be "reasonably apprised, as a matter of common intelligence, in light of ordinary human experience, that his particular conduct was unlawful." State v. Lashinsky, 81 N.J. 1, 18 (1979). This is the correct due process standard under Grayned. The New Jersey Supreme Court, however, failed to observe it in this case because until 1982, Petitioners were not reasonably apprised as a matter of common intelligence that Scarfo was to be considered a career offender for the purposes of the Act.

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6. Section 86(f) defines a career offender as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this state." N.J.S.A. 5:12-86(f).

Petitioners ask this Court what they rhetorically asked the New Jersey courts: when were they supposed to know not to associate with Scarfo. Certainly in 1977 when the Casino Control Act was enacted, Petitioners had no indication that at that time Scarfo was a career offender. It was not until 1982 when the Commission specifically found that Scarfo was a career offender that Gerace or Materio had any actual notice. Significantly, each of the incidents of association relied on by the Division in its prosecution took place prior to the identification of Scarfo as a career offender.

Possibly the best evidence of the vague and ambiguous character of section 86(f) is the fact that Scarfo was not "black-listed" by the Commission until six months after Petitioners were disqualified. Section 71 of the Act provides that the Commission shall establish a list of persons who are to be excluded from a licensed casino and that list shall relate to persons whose presence in a licensed casino would, in the opinion of the Commission, be "inimical" to the interest of the

State of New Jersey. N.J.S.A. 5:12-71. Inasmuch as the Commission determined that it was not "inimical" to the interests of the State to have Scarfo conversing with high casino management in 1982, it was plainly unfair for the agency to expect that -- prior to that time -- Petitioners should have known that their commiseration with Scarfo was "inimical."

The Appellate Division affirmed the Commission's contention that Petitioners should have been put on notice that Scarfo was a "career offender" by means of general media publicity. (67a). It is therefore apparent that in place of clear and understandable statutory language that reasonably apprises a person of what conduct is improper, New Jersey advocates "trial by the press" via unconfirmed assertions supported by unnamed sources. The State of New Jersey's notion of fair play and proper warning therefore permits the general media to determine whether an individual is a "career offender" for the purposes of the Act. This Court has stated that "vague laws may trap the innocent by not providing fair warn-

ing." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Petitioners contend that unconfirmed assertions by the general media do not provide the adequate fair warning which is required by the Constitution.

Due process required that Petitioners be provided with a reasonable opportunity to know what conduct the Act prohibited so that they could act accordingly. Since Petitioners did not have notice that Scarfo was a career offender until after the Division sought their disqualification, they did not have an adequate opportunity to dissociate themselves from Scarfo prior to the Commission's attempt to have them removed from Union office. This lack of adequate notice is unfair and cannot withstand due process scrutiny. Review by this Court is therefore both necessary and appropriate at this time.

B. The Term Inimical Does Not Give A Person Of Ordinary Intelligence Adequate Notice Of What Conduct Is Prohibited By The Act

Neither Respondent contended that all associations with career offenders are "inimical" under

section 86(f). Had that been the case, the legislature would have simply prohibited all such associations by making no reference to the "inimical" requirement. By prohibiting "inimical" associations, however, the legislature placed an impossible burden on individuals involved in the casino industry. They were required to speculate as to which of their existing associations with unnamed career offenders were to be ended.

This Court's decision in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S 283 (1982) exemplifies its concern with vagueness issues. In Aladdin's Castle, the Court concluded that a regulation in a civil matter requiring an investigation into a licensee's connection with "criminal elements" is not void for vagueness under federal constitutional standards. The Court found that the "connection with criminal elements" standard was merely a factor in, and not determinative of, the decision whether a license application woul be approved. If, however, the application of the disputed term "connection with criminal elements" was determinative of the licensing decision, the

Court assumed, without deciding, that such a standard was "too vague to support the denial of an application for a license...." 455 U.S. at 290.

The principles of Aladdin's Castle are applicable here. Like the term "connections with criminal elements", the section 86(f) term "inimical... association with a career offender" is too vague to support the denial of a license. In contrast to the statute in Aladdin's Castle, however, the disputed term in section 86(f) is in fact determinative of the licensing decision. Indeed, the disputed section 86(f) terms are the standard for approval or disapproval of a union official's qualifications. Therefore, unlike the disputed statute in Aladdin's Castle, section 86(f) cannot withstand the constitutional challenge to its imprecision and lack of standards.

In addition, the verbal shortcomings of 86(f) are magnified by the harshness of the Commission's application of the Act. Petitioners were held to a standard for which there was no statutory authority. Concurrently, they were penalized for actions which took place prior to any fair warning.

As noted, the Commission acted before it identified those persons with whom a mere association might be considered "inimical" to the gaming industry.

Having found "no direct evidence" of influence, the Commission took the position that the reputation of some career offenders is so odious as to make any association with them "inimical" to the gaming industry. The imposition of this standard on an existing relationship, without warning, is simply unfair. Unfairness rises to the level of deprivation of due process where the vehicle for warning was available and ignored. Had Scarfo been blacklisted pursuant to section 71 and evidence of a continued relationship with Petitioners been presented to the Commission, Petitioners would have no due process claim.

This case is one of first impression. Although Hotel and Restaurant Employees, Etc. v. Danzinger, 536 F. Supp. 317 (D.N.J. 1982) upheld section 86(f) as not being unconstitutionally vague, that case does not control the matter sub judice. In Danzinger, the Court based its

decision on what it considered to be an "objective standard for judging an applicant's actions." Id. at 337. The Court focused on the statutory requirement that the Commission have a "reasonable belief" that the disputed association was "inimical to the Act. Id.

The Danzinger decision is erroneous. The Court missed the point of the vagueness argument. The fact that the Commission had "a reasonable belief" of what the Act provided offered no notice to Petitioners, who must have reason to know what conduct is prohibited by the Act. This Court has stated that "[a]ll are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). By failing to sufficiently inform a person of ordinary intelligence what is precisely prohibited, the "inimical" standard in section 86(f) risks the ensnarement of the innocent in a law designed for others.[7] The vagueness of section 86(f) runs afoul

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7. Winters v. New York, 333 U.S. 507, 525 (1948) (Frankfurter, J., dissenting).

of the right of due process. The section is void on its face.

The constitutional problem in this case is that section 86(f) contains no ascertainable standards of guilt. Because section 86(f) permits a disqualification based merely on the undefined terms "if...inimical," the statute encourages arbitrary enforcement dependent solely on the whim of the Commission. Therefore, Petitioners rely on this Court's statement that a statute is unconstitutionally vague if the discretion of those who must enforce it is not limited by explicit legislative standards. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

In this case, the Commission's disqualification decision was based on the determination of whether a particular association was "inimical" to the Act. The relevant statutory language, however, is unaccompanied by any criterion upon which a disqualification decision is to be made. The inclusion of such precise criterion could have been easily drafted by the New Jersey legislature. For example, the legislature could have adopted pro-

visions similar to those set out in the Waterfront Commission Act. That statute espoused the same prophylactic purpose as the Casino Control Act, but fulfilled its constitutional obligation and specifically set out the grounds for the revocation of licenses. See N.J.S.A. 32:23-93 (1963).[8]

Where there are no standards governing the exercise of discretion by an administrative agency, the agency is encouraged to act arbitrarily. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972). Indeed, in this case, the lack of standards left the discretion of the Commission unbridled and furnished a convenient tool for the agency to act against someone it "deemed to merit their displeasure." Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

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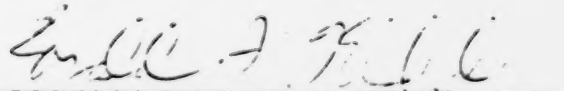
8. In Section 93 of the Waterfront Commission Act, the New Jersey legislature set out five specific grounds for revocation of licenses and registrations. N.J.S.A. 32:23-93. Section 93 does not contain any all consuming or unmanageable terms such as "inimical." Id.

The indefiniteness of section 86(f) trapped Petitioners in a net that was intended for persons whose associations with career offenders involved improper conduct. Petitioners' disqualification directly resulted from the failure of the New Jersey legislature to provide adequate notice in the statute as to what specific conduct was prohibited. For these reasons, the statute is void for vagueness. The writ should issue so that this Court can review and correct the decision of the Court below.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,



Ronald F. Kidd
Steven M. Janove
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102

Harry A. Horwitz
DAVIS, REBERKENNY & ABRAMOWITZ
499 Cooper Landing Road
Cherry Hill, NJ 08034

Attorneys for Petitioners